(1)

NO. 90-877

IN THE

Supreme Court of the United States

October Term, 1990

No. _____

WILLIAM DEE,
ROBERT LENTZ,
and
CARL GEPP

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Fourth Circuit err in holding that Petitioners, as Federal government officials or employees, were not immune from Federal criminal prosecution for alleged violations of the Resource Conservation and Recovery Act?

II. Did the United States Court of Appeals for the Fourth Circuit err in holding that Petitioners demonstrated the requisite intent to support criminal convictions for violations of the Resource Conservation and Recovery Act?

PARTIES TO THE PROCEEDING

The only parties to the proceeding in the court whose judgment is sought to be reviewed (United States Court of Appeals for the Fourth Circuit) are named in the caption here: William Dee, Robert Lentz, and Carl Gepp, as Petitioners, and the United States of America, as Respondent.

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United States v. Dee, 912 F.2d 741, 31 ERC 1953 (4th Cir. 1990).

GROUNDS FOR JURISDICTION

The decision of the Court of Appeals for the Fourth Circuit was issued on September 4, 1990.

No motion for rehearing was filed. There have been no motions submitted to this Court for extension of time within which to file this Petition for Writ of Certiorari.

Jurisdiction to conduct the requested review is conferred upon this Honorable Court by 28 U.S.C. Sec. 1254.

STATUTES INVOLVED IN THIS CASE

42 U.S.C. Sec. 6003(15)

42 U.S.C. Sec. 6928(d)

42 U.S.C. Sec. 6961

The pertinent text of each statute is contained in the Appendix to this Petition [see separate volume].

STATEMENT OF THE CASE

This matter involves a trial of more than seven weeks on a five-count indictment issued June 28, 1988 against Petitioners William Dee, Robert Lentz, and Carl Gepp. The indictment was filed in the United States District Court for the District of Maryland.

Petitioners each held positions within an organization known as the Munitions Directorate of the Chemical Research, Development, and Engineering Center (CRDEC) at the Aberdeen Proving Grounds, operated by the United States Army in Harford County, Maryland.

The indictment involved a portion of the Aberdeen grounds known as the "Pilot Plant," where various sensitive chemical weapons projects were conducted. The indictment charged

violations of the Resource Conservation and Recovery Act (RCRA) and of the Clean Water Act. These charges related to a three-year period from mid-1983 to mid-1986. Count One alleged illegal storage and disposal of dimethyl polysulfide, also known as NM. Counts Two, Three and Four alleged illegal storage, treatment or disposal of dozens of chemicals at various times and places. Count Five alleged a criminal violation of the Clean Water Act relating to an acid leak in September 1985.

A superseding indictment was issued November 29, 1988, which added, eliminated or redefined various chemicals described in Counts Two through Five. A motion to dismiss was filed September 2, 1988 and was answered

by the Government on September 16 (a reply memorandum by Petitioners was filed on September 30 with a further Government response on November 8).

The motion to dismiss pointed out the inapplicability of RCRA's criminal enforcement provisions against Petitioners. The motion stated the federal government and thus its employees are excluded from the RCRA definition of "person" and that RCRA waives sovereign immunity only for injunctive relief, making injunctive relief the only RCRA sanction against federal employees acting within their responsibilities.

The motion to dismiss was denied, after a hearing, on December 9, 1988. Notice of appeal was filed December 19, 1988. The United States Court of Appeals

for the Fourth Circuit held its consideration of that appeal until the conclusion of trial.

At trial before the United States District Court for the District of Maryland (John R. Hargrove, J.), the jury heard from more than 50 witnesses and were presented with more than 200 exhibits. On February 23, 1989, at the end of this exhaustive trial, the jury convicted Petitioners of various counts.

Petitioner William Dee was convicted of Count Four (storage and disposal of various chemicals at the Old Pilot Plant). Petitioner Robert Lentz was convicted of Count One (storage and disposal of dimethyl polysulfide), Count Three (treatment and disposal of chemicals in toxic neutralization systems at the Pilot Plant), and Count

Four (storage and disposal of certain chemicals at the Old Pilot Plant).

Petitioner Carl Gepp was convicted of Count One (storage and disposal of dimethyl polysulfide), Count Two (storage and disposal of chemicals for a project known as the Chemical Hazardous Response Information System (CHRIS) and other chemicals at the Pilot Plant), and Count Three (treatment and disposal of chemicals in neutralization systems).

None of the Petitioners was convicted of Count Five, the Clean Water Act charge relating to an approximately 200-gallon acid leak into a creek (Canal Creek) on the Proving Ground premises. This charge is thus not involved here.

On May 11, 1989, the United States District Court sentenced each Petitioner to three years' probation and 1,000

hours of community service. Appeal to the United States Court of Appeals for the Fourth Circuit was noted on May 17, 1989.

In their appeal, Petitioners raised several issues. Among them were crucial issues of immunity from prosecution and lack of criminal intent.

On September 4, 1990, the Fourth Circuit affirmed the convictions (United States v. Dee, 912 F.2d 741 (4th Cir. 1990)). The Court concluded there is no immunity from criminal prosecution for government employees acting for or on behalf of their federal agency. The Court also concluded that Petitioners had the requisite criminal intent to support their convictions.

Petitioners contend to this Court that the Fourth Circuit did not suffi-

sufficiently consider the immunity issue here. Neither did the Court carefully review the question of criminal intent, especially in view of the different approaches taken in the Circuits to criminal intent regarding RCRA.

Petitioners point out that these circumstances are quite unique. This is a rare instance of federal government employees criminally prosecuted for violations of federal hazardous waste laws. As such, Petitioners contend the entire facility, rather than individual actions, should be the focus here.

As to immunity, the issue involves: 1) whether immunity from criminal prosecution extends to federal government employees acting for or on behalf of their agency and acting within their official responsibilities and 2)

whether Congress in the present version of RCRA intended federal facilities, agencies, or employees to be exempt from criminal responsibility for alleged hazardous waste violations.

As to criminal intent, Petitioners also point to the unique nature of these circumstances. This is not a case of wholesale dumping of large-scale chemical wastes into a backyard stream, or of deliberate, considered action to evade hazardous waste requirements.

Petitioners were well-regarded employees of a neglected facility, in poor condition, which received little attention as to needed repairs and improvements while Petitioners were expected to comply with requirements concerning hazardous substances.

Further, these requirements were

characterized as safety rather than environmental concerns. No suggestion was made to Petitioners, nor were they aware, that possible criminal responsibility was involved.

The seven-week trial here encompasses more than 4,700 pages of transcript. Yet, regardless of the massive Government effort to obtain a conviction, and despite the conclusions of the Fourth Circuit, Petitioners contend that key aspects necessary to support the charges, including immunity and criminal intent, were never sufficiently resolved.

I. ORGANIZATIONAL REVIEW

The time period of the indictment, mid-1983 to mid-1986, relates to activities of Petitioners within their responsibilities at the Chemical

Research, Development, and Engineering Center (CRDEC), a large organization at the Aberdeen Proving Ground (APG), a 79,000-acre installation operated by the United States Army. Petitioners had obligations within one of CRDEC's nine directorates--the Munitions Directorate, which develops chemical agents and delivery systems for field troops.

The Munitions Directorate included a complex known as the "Pilot Plant" (building E5625), a four-story building built in the 1940s with several laboratories, where an array of sensitive projects were conducted. Also on the APG premises was a formerly-used building, known as the Old Pilot Plant (building E3640), which had been closed in 1978 by previous CRDEC managers.

The Aberdeen Proving Ground is the

"landlord" for more than 40 "tenants" each conducting their own operations. As "landlord," APG itself is ultimately responsible for base administrative operations, including environmental and hazardous waste programs.

The Chemical Research, Development, and Engineering Center (CRDEC) with its various directorates (including the Munitions Directorate in which Petitioners worked), is APG's largest "tenant." CRDEC has more than 1,300 employees and more than 100 different projects.

Within the Munitions Directorate of the CRDEC were various divisions and branches, including the Producibility, Engineering and Technology division. Within that division was a branch known as Process Technology.

Petitioner William Dee was chief of the Munitions Directorate of CRDEC. Petitioner Robert Lentz was chief of the Producibility, Engineering, and Technology division of the Munitions Directorate. Petitioner Carl Gepp was chief of the Process Technology Branch of the Producibility, Engineering, and Technology Division.

On the Pilot Plant premises were toxic neutralization sumps. These sumps were designed to neutralize waste chemicals and involved neutralizing the acid/base (pH) value of these chemicals so that the resulting fluid can be sent to a treatment facility within the APG.

One of the projects supported by the Pilot Plant was CHRIS (Chemical Hazardous Response Information System). The CHRIS project was commissioned by

the Coast Guard to obtain data on selected chemicals to formulate spill response plans.

Among other CRDEC Directorates is the Environmental Technology Directorate. Among its responsibilities is to ensure that CRDEC activities are planned and executed in an environmentally acceptable manner.

Another CRDEC directorate is Research and Development Engineering. Among its responsibilities is coordinating with APG for maintenance of CRDEC buildings. The duties of Environmental Management Office in the Engineering and Housing Directorate include obtaining and maintaining environmental permits and coordinating with federal and state agencies. Also, there was a special CRDEC Safety Office, reporting to CRDEC Deputy Commander. It was concerned

primarily with employee safety. And of note are two other APG tenant agencies: the United States Army Environmental Hygiene Agency (USAEHA) and the United States Army Technical Escort. The USAEHA provides guidance and support to Army installations in environmental hygiene and related areas. The United States Army Technical Escort is a special unit able to respond to hazardous chemical incidents at APG or elsewhere.

Environmental compliance, monitoring, and APG hazardous waste management for "tenants," including CRDEC therefore involved interlocking responsibilities of numerous offices, directorates, and special agencies. In addition, there was delay, neglect, confusion, paperwork, and failed communications as to the Pilot Plant.

It was no secret that the Pilot Plant (E5625) was old, in poor condition, and badly in need of repair. As structural problems worsened, and as the Pilot Plant increasingly became the target of environmental investigations and inspections from both inside and outside CRDEC and APG (beginning in September of 1985), there was a failure of those in authority at CRDEC and APG to take responsibility for its problems.

Among the myriad APG regulations was APG 200-2, "Waste Management at APG," updated in May of 1982 (but not substantially updated until 1989 despite major changes in RCRA in 1984). APG 200-2 required environmental compliance at APG, although its prime purpose was to identify waste disposal procedures. The Government claimed Petitioners knew the

full reach of that regulation. Yet individuals in authority during that period, including Brigadier Gen. James Klugh (CRDEC commander, January 1984 to July 1986) and Brigadier Gen. Peter Hidalgo (then Commander of the U.S. Army Toxic and Hazardous Materials Agency and later CRDEC commander--1986), were unfamiliar with or uncertain about it.

There were memoranda, inspections, documentation, and reports issued by the Safety Office and other offices on the Pilot Plant in 1983 and 1984, chiefly regarding safety issues, with generic references to environmental compliance. But not one witness testified that the Petitioners were ever put on notice of specific failures of environmental compliance at the Pilot Plant, let alone that criminal violations of

environmental laws were at stake.

In Pilot Plant operations, a chemical known as dimethyl polysulfide (NM) was used. It was a component of a binary chemical weapons project.

Several NM drums were stored at the Pilot Plant. Its poor condition was made dramatically obvious in September of 1983, when a portion of the roof collapsed, crushing some NM drums and requiring a response to the incident.

Several witnesses testified about NM clean up. Chemical removal procedures (known as "hard-card turn-ins") for the NM were initiated in August of 1984, but the APG waste removal contractor did not pick up the NM until March of 1986.

Throughout this time period and after, reports from outside consultant firms were commissioned by CRDEC, the

Army Corps of Engineers, and APG about the Pilot Plant and its condition. Various options were considered, such as restoring the present Pilot Plant or building a new facility. But no progress was ever ultimately made on these items in the bureaucracy of CRDEC, APG, the Department of Defense, or in Congress.

Numerous repair orders were submitted for the Pilot Plant. Yet they were rarely completed in a timely fashion or at all. Thus, the Pilot Plant deteriorated while its operations continued, notably a critical United States binary chemical weapons program. Petitioners performed their duties as far as possible in these conditions.

In May, 1983, various chemicals were moved from the Old Pilot Plant (E3640) to the Pilot Plant (E5625).

Witnesses told of allegedly improper or haphazard practices in the transfer or disposal of these chemicals.

However, these witnesses did not indicate that Petitioners conducted these activities themselves, or that Petitioners conducted these disposal activities with any criminal intent.

Much more attention was directed at the Pilot Plant in January to April of 1986 when a series of newspaper articles appeared about allegedly improper chemical storage and disposal activities at APG. The articles were prompted in part by the efforts of a Pilot Plant employee concerned about worker safety, who determined that CRDEC and APG authorities would not follow through on repair assurances.

After these articles appeared, and

in view of other incidents (such as the September, 1985 acid leak into Canal Creek) several inspections and visits were conducted by the Environmental Protection Agency, the Maryland environmental agency, CRDEC and APG authorities, and representatives of Congressional offices. Finally, in March, 1986, the Pilot Plant, due to its deterior-ating physical condition, was ordered closed by CRDEC Commander Klugh. In June, 1988, Petitioners were indicted.

II. POINTS AS TO TRIAL

The testimony of Government witnesses certainly established that innumerable meetings and documentation about the Pilot Plant dealt principally with safety issues, rather than environmental concerns. The testimony also demonstrated the complexity of

responsibilities, the APG bureaucracy, and the paperwork required to dispose of even a small amount of the most innocuous chemical. Further, it was shown through Government witnesses that there were varying views within the CRDEC on the continued viability of the Pilot Plant and what should be done about its deteriorating condition.

The Government presented testimony from Pilot Plant employees concerning incidents of removal, transportation, storage, or disposal of chemicals, including transporting chemicals from the Old Pilot Plant to the Pilot Plant, storage of CHRIS chemicals, and problems with the toxic neutralization sumps.

However, at least two Government witnesses confirmed there were limited funds available through utilization of

an "overhead budget" for Pilot Plant repairs and noted budget problems concerning repairs. One witness stated that federal buildings cannot be restored if doing so cost more than half the price of a new structure.

Maj. Gen. James Klugh, CRDEC commander at the time, testified and noted responsibilities regarding the Pilot Plant. Yet he gave little indication that he was aware of Pilot Plant problems or was prepared to assume responsibility for them.

Defense witnesses noted, among other things, a lack of CRDEC emphasis on environmental matters from 1983 to 1985, indicating a lack of urgency about Pilot Plant disposal or storage issues.

Recalling certain Government witnesses, the defense also emphasized

that amid the flurry of memoranda, meetings, documentation, reports, studies, and disposition forms, little if anything was being done to respond to work orders, to emphasize the urgency of Pilot Plant problems, to repair or restore the Pilot Plant to proper working condition, or to inform the Petitioners of specific environmental corrective action required at the Pilot Plant, let alone any potential criminal liability if the situation continued.

Brigadier Gen. Peter Hidalgo stated that installation and CRDEC commanders are responsible for activities within their commands, including environmental problems at the Pilot Plant. He pointed out these duties are non-delegable.

Other defense witnesses noted a dangerous slowness of response through

all authorities within and outside of the CRDEC to the problems at the Pilot Plant. Defense witnesses confirmed Pilot Plant budgetary problems in obtaining CRDEC funds for environmental projects. These witnesses also noted the minimal response by "landlord" APG to its maintenance obligations and the difficulty, even as late as June of 1986 when environmental sensitivity was high due in part to newspaper articles, in obtaining answers from APG to basic environmental concerns.

Witnesses also confirmed that Petitioners repeatedly noted to proper authorities Pilot Plant repair and renovation needs. They also cited the lack of CRDEC command emphasis as to environmental issues at staff meetings.

Petitioners also testified. They

described the interminable problems in seeking repair of the Pilot Plant. They pointed out the high performance appraisals they were receiving during the period that they were supposedly committing criminal acts. They further emphasized the bureaucratic nature of CRDEC which brought inspectors and investigators to the Pilot Plant when newspaper articles and Congressional offices were beginning to raise concerns about environmental and safety issues, but hardly the same interest before.

Petitioners' testimony confirmed that whatever may have been stated in isolated memos or reports, there were no specific recommendations made by CRDEC or APG about hazardous waste management at the Pilot Plant, or about the pressing need to conduct chemical clean-

ups, prior to the Pilot Plant closing in March of 1986. And there was little if any money earmarked or approved for Pilot Plant repair thoughout this time period.

Thus, in these Pilot Plant matters, there was never any criminal intent by Petitioners to violate any environmental laws. Not one of them took any action to deliberately avoid responsibilities.

This situation therefore involves central and crucial issues regarding federal enforcement of environmental laws at federal facilities.

ARGUMENT FOR GRANTING WRIT

I. THE FOURTH CIRCUIT ERRED IN HOLDING THAT PETITIONERS, AS FEDERAL EMPLOYEES, ARE NOT IMMUNE FROM CRIMINAL PROSECUTION FOR VIOLATIONS OF THE RESOURCE CONSERVATION AND RECOVERY ACT

The Fourth Circuit found that the

definition of "person" in the Resource Conservation and Recovery Act at 42 U.S.C. Sec. 6903(15) encompasses Petitioners. The Court stated RCRA's definition of "person" includes "individuals" and Petitioners "of course, were indicted, tried, and convicted as individuals not as agents of the government." Also, "sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts." 912 F.2d at 744.

The Fourth Circuit continued, in affirming the convictions, "Even where certain federal officers enjoy a degree of immunity for a particular sphere of official actions, there is no general immunity from criminal prosecution for actions taken while serving their

office." 912 F.2d at 744.

The Fourth Circuit, however, did not comprehensively consider the immunity question. Central issues are whether immunity from criminal enforcement extends to federal employees acting within official responsibilities, and whether Congress excluded federal employees from criminal prosecution under RCRA.

1. RCRA Language and "Person"

The statute authorizes criminal sanctions for "any person" who knowingly commits an act prohibited by 42 U.S.C. Sec. 6928. And "person," as defined by RCRA (Sec. 6903(15)), is:

> an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

The RCRA definition of "person" includes "individuals," but there is no mention of the United States or federal agency.

The term "federal agency" is in fact separately defined in RCRA Sec. 6903(4) as "any department, agency, or other instrumentality of the Federal Government." Thus, the RCRA definition of "person" omits federal agencies or employees. The omission is not semantic.

Congress' deliberate omission of federal agencies from the definition of "person," combined with the plain language of RCRA criminal provisions, leads to the conclusion that Congress decided to prohibit criminal RCRA prosecution of federal agencies. Since the Government can act only through its officers and agents (see, e.g., Arizona

v. Maypenny, 451 U.S. 232, n. 16 (1981)), this exemption applies to agency employees carrying out official responsibilities.

A similar statement as to a federal agency acting through its agents was made in Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938), involving violations of banking laws by Treasury officials. The court echoed statements in In re Neagle, 135 U.S. 1 (1890); Spalding v. Valis, 161 U.S. 483 (1896); and Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977). Neither is this an academic exercise. It is at the heart of the interests and policies involved in the formation and enactment of RCRA itself.

The exclusion of the United States and federal agencies from RCRA's definition of "person" is thus extremely

pertinent, particularly when the same definition under other federal environmental statutes expressly includes these entities.[1] Where a statute contains a certain provision, as to a given subject, the omission of such provision from a similar statute indicates a different intent existed. Richardson v. Jones, 551 F.2d 918 (3rd Cir. 1977).

Even more revealing is the fact that Congress demonstrated it knew how to include federal agencies in the

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1. Compare 42 U.S.C. Sec. 7602(e) (Clean Air Act) ("person" includes "any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof"), and 42 U.S.C. Sec. 9601(21) (Comprehensive Environmental Response, Compensation, and Liability Act) (definition of person includes "United States Government").

definition of "person" elsewhere in RCRA. In 42 U.S.C. Sec. 6992e(b) (Underground Storage Tanks) it is stated that for purposes of the federal facilities provision of that subchapter, the definition of "person" includes "each department, agency, and instrumentality of the United States."

When Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in doing so. Russello v. United States, 464 U.S. 16 (1983). Thus, the RCRA exclusion of federal agencies and their employees from the definition of "person" plainly shows that Congress did not intend to subject federal employees acting as the agency (that is,

within the scope of their employment) to criminal liability.

Further, that RCRA in its present form does not contain the authority to subject federal facilities or their employees to criminal sanction is underscored by attempts to amend RCRA to permit just such criminal prosecution. (See H.R. 1056 [in Appendix to this Petition], passed by House of Representatives but not by Senate.)

This proposed amendment would explicitly have included federal agencies or employees within the RCRA definition of "person," and allowed for criminal prosecution of federal employees for RCRA violations.

An amendment is intended to change the law as it formerly existed, and is to be given great weight in determining

the intent and meaning of the previous law. See 73 Am.Jur.2d Statutes, Sec. 343, United States v. Canadian Vinyl Industries, Inc., 555 F.2d 806 (Cust.Ct. 1977); May Department Stores Co. v. Smith, 572 F.2d 1275 (8th Cir. 1978), cert.den. 434 U.S. 837, and Johnson v. Heckler, 607 F.Supp. 875 (D.Ill. 1984).

Congress, by this amendment process, thus recognized that RCRA in its present form does not authorize criminal prosecutions against federal employees acting for their agency.

2. Federal Employee Immunity

As to the issue of immunity itself, it is well established that a government official empowered to take action and who acts properly within the scope of

authority, retains this immunity (unless it has been waived). Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 112 n. 22 (1984); Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), and Swanson v. Willis, 114 F.Supp. 434, 435 (D. Alaska 1953), aff'd 220 F.2d 440 (9th Cir. 1955).

A straightforward reading of RCRA Secs. 6903, 6928, and 6961 further demonstrates RCRA criminal sanctions cannot be applied against federal employees acting within their authority. Civil sanctions alone are permitted.

Federal compliance with RCRA requirements is fully described in Sec. 6961, which provides a sanction of civil injunctive relief. The absence in Sec. 6961 of a reference to criminal sanctions is further indication that

Congress did not intend federal employees to face criminal prosecution. Several courts have found the waiver of sovereign immunity in Sec. 6961 to be extremely limited, or have determined it does not permit criminal prosecution.

In California v. Walters, 751 F.2d 977 (9th Cir. 1984), the court decided California's state criminal sanctions regarding disposal of infectious waste are not a "requirement" under Sec. 6961. Thus RCRA did not compel compliance with state law by the Veterans Administration (as to a Veterans hospital). The Walters court determined the waiver of immunity found in Sec. 6961 extends only to civil injunctive relief.

The court found the language of Hancock v. Train, 426 U.S. 167 (1976), concerning similar provisions of the

Clean Air Act, did not require a more expansive reading of RCRA Sec. 6961. The Walters court stated, "Section 6961 plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions" (751 F.2d at 978).

This restrictive view of Sec. 6961 as to waiver of immunity, following Walters, is also found in Meyer v. United States Coast Guard, 644 F.Supp. 221 (E.D.N.Car. 1986), involving a civil administrative penalty sought against the Coast Guard by the North Carolina environmental protection agency. The court found that Sec. 6961 "does not waive sovereign immunity for civil penalties" (644 F.Supp. at 223).

As was noted in McClellan Ecological Seepage Situation [MESS] v. Weinberger, 655 F.Supp. 601 (E.D. Cal. 1986), finding also that the sovereign immunity waiver does not extend to civil penalties against federal agencies, the RCRA definition of "person" (Sec. 6903(15)) "seems to name everyone under the sun save for the United States of America." The court also noted:

> This Court cannot believe that if Congress wished to waive immunity for civil penalties it could be so careful, so all-knowing, so engaged in foresight and insight as to define 'person' to include the United States for purposes of jurisdiction in the RCRA citizen suit provision, and yet could forget, misappropriate, or be so negligent as to decline to include the United States in its overall, all-encompassing definition of 'person' in RCRA Sec. 1004(15) [Sec. 6003(15)], which is applicable to compliance orders and civil penalties.

And in United States v. Washington, 872 F.2d 740 (9th Cir. 1989), the court considered state penalties sought against the Hanford Nuclear Reservation operated by the Department of Energy for, among other things, "illegal accumulation of dangerous waste in four non-designated storage areas." The Ninth Circuit again stated that Sec. 6961 does not waive sovereign immunity for state civil penalties. The Washington court stated at 872 F.2d at 743:

> Thus, the only unequivocal and express reference to sovereign immunity in section 6961 is directed at court-ordered sanctions for a violation of an injunction. 'In short, Congress demonstrated that it knows how to select language to waive sovereign immunity to criminal penalties and civil damages, if it so intends.' Parola v. Weinberger, 848 F.2d 956, 962 n. 3 (9th Cir. 1988).

The court stated at 872 F.2d at 746 that

"criminal prosecution is not an enforcement mechanism covered under section 6961."

Further, RCRA legislative history indicates that limiting sanctions against federal facilities to civil injunctive relief was not the result of Congressional inadvertence. (see H.R. Rep. No. 1491, 94th Cong., 2d Sess. at 1976 U.S. Code Cong. and Adm. News, at 6283-84, and 6289, stating that "After considering all aspects of the jurisdictional enforcement problem, the Committee decided to retain sovereign immunity over federal facilities").

Numerous courts therefore have held that 42 U.S.C. Sec. 6961 allows limited waiver of immunity for injunctive relief only, and therefore prohibits prosecutions seeking any other sanction.

This immunity extends to government officials acting within their capacity and in good faith, even if these actions later are determined to be wrongful. In Gravel v. United States, 408 U.S. 606 (1972), involving a senator's private publication of the Pentagon Papers, no immunity was found because the action was outside the legislative process. Conversely, if an act is within official duties and done in good faith, immunity can extend to criminal prosecution (see Braatelein v. United States, 147 F.2d 888, 895 (8th Cir. 1945)).

This immunity applies whether the enforcement action is state or federal. Section 6961 limits all enforcement action against federal agencies to injunctive relief. Congress clearly did not consent to federal officials

criminally prosecuting other federal officers merely doing their jobs.

The Constitution (art. VI, sec. 8, cl. 17), limits legislative authority over federal enclaves to Congress' exclusive jurisdiction. For RCRA purposes, Congress in Sec. 6961 has opted to retain exclusive jurisdiction over APG and similar federal enclaves.

Thus, because Section 6961 and Section 6903 are Congress' expression of RCRA's application to federal enclaves, these sections contain the extent of the United States Attorney's authority to prosecute under RCRA for alleged environmental wrongdoing at federal facilities. Federal enforcement of RCRA requirements at federal facilities is therefore limited to injunctive relief.

The criteria in caselaw drawing the difficult line between sovereign and individual action shows that federal officials do not automatically lose their sovereign immunity protection whenever a violation of a federal statute or regulation occurs. United States v. Yakima Tribal Court, 794 F.2d 1402, 1407 (D.Mont. 1987); Nichols v. Block, 656 F.Supp. 1436, 1440 (D.Mont. 1987). Action by a government official is still the act of the sovereign, even if wrong, provided the official's action was for a purpose vested in him or her. E.g., Larson v. Domestic and Foreign Commerce Corp, 337 U.S. 682, 695 (1949).

As was noted in Scherer v. Morrow, 401 F.2d 204, 205 (7th Cir. 1968), cert.den., 393 U.S. 1084 (1969), "To be within that perimeter, and therefore

absolutely privileged, 'it is only necessary that the action bear some reasonable relation to and connection with the duties and responsibilities of the official.'" (quoting Scherer v. Brennan, 379 F.2d 609, 611 (7th Cir. 1967), cert.den., 389 U.S. 1021 (1967)). Whether a federal employee can be "authorized" to violate RCRA is not the question. Instead, the criteria is whether the actions taken were in the performance of official duties and were necessary to carry out those duties. See Morgan v. California, 742 F.2d 728, 731 (9th Cir. 1984).

Therefore, immunity of federal employees acting with their authority applies to civil and criminal liability. Nothing in RCRA affects this immunity.

Petitioners clearly were charged for acts within official duties, and no more. Their actions were within their responsibilities of conducting and supervising sensitive research, an integral part of the defense establishment. Petitioners did not act solely as "individuals," nor did they act for personal profit or advancement.

The Government's prosecution of the Appellants was not authorized under RCRA and should have been dismissed. This prosecution was therefore invalid.

II. THE FOURTH CIRCUIT ERRED IN FINDING THAT THE REQUISITE CRIMINAL INTENT WAS DEMONSTRATED HERE.

The Fourth Circuit concluded, in affirming the convictions, that Petitioner's argument reduces itself to a contention that "ignorance of the law

is no defense" noting decisions of this Court in United States v. International Minerals, 402 U.S. 558 (1971); United States v. Freed, 401 U.S. 601 (1971); United States Dotterweich, 320 U.S. 277 (1943), and United States v. Balint, 258 U.S. 250 (1922). The Fourth Circuit thus concluded that the Government "did not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes." 912 F.2d at 745.

The Fourth Circuit did not take into account that the intent requirement for a criminal conviction under RCRA has been variously construed by the Circuits. It also did not consider the intent issue in the rather unique circumstances here.

As to intent, some federal courts have held that criminal liability under RCRA requires a specific intent. Others have indicated a more general intent. Either approach requires a finding of some criminal intent to violate an environmental law.

In United States v. International Minerals, 402 U.S. 558 (1971), this Court considered a conviction for failing to list on shipping papers the nature of certain chemicals being transported, in accordance with federal regulations. The trial court had dismissed the charge (see Boyce Motor Lines v. United States, 342 U.S. 337 (1952)) because the knowledge requirement was not met.

The International Minerals Court noted that Boyce did not apply to the

knowledge issue, because that case dealt only with the vagueness of the statute. This Court indeed stated that ignorance of the law or of the regulation involved is not a defense to criminal liability.

However, this Court also noted, at 402 U.S. at 563-564:

> So far as possession, say, of sulfuric acid is concerned the requirement of 'mens rea' has been made a requirement of the Act [18 U.S.C. Sec. 834] as evidenced by the use of the word 'knowingly.' A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered.

See also Morissette v. United States, 342 U.S. 246 (1951), noted by International Minerals with approval, and involving criminal charges for removing spent shell casings from an old government bombing range frequented by hunters. The Court in Morissette found

that the requisite criminal intent did not exist and stated that intent as a requirement for a crime is "no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

However, International Minerals, in reversing the dismissal of the charges, stated that the defendants "must be presumed to be aware" of such regulations, due to the high "probability of regulation" concerning "dangerous or deleterious devices or products or obnoxious waste materials."

Thus, in United States v. Hayes International, 786 F.2d 1499 (11th Cir. 1986), which dealt with criminal RCRA

liability for transporting hazardous waste, judgments of acquittal were reversed. The court rejected a lack of knowledge defense suggested by cases such as Boyce and Liporata v. United States, 417 U.S. 419 (1985) (food stamp authorization cards). Taking a broad view, the court stated it would be "no defense to claim no knowledge that a paint was a hazardous waste within the meaning of the regulations; nor would it be a defense to argue ignorance of the permit requirement."

However, even with Hayes International's approach indicating that a general intent is sufficient, that court recognized the statute does not impose strict liability. There could be situations where a defendant "reasonably believed that [a waste] site had a per-

mit, but in fact had been misled by the people at the site." And the court noted a mistake of fact defense may be possible in certain instances.

See also United States v. Greer, 850 F.2d 1447 (11th Cir. 1988) (criminal RCRA violations as to waste recycling business in Orlando, Florida; court follows Hayes International language as to inference of intent and as to general intent sufficient for criminal violations (850 F.2d at 1452)), and United States v. Protex Industries, Inc., 874 F.2d 740 (10th Cir. 1989) ("knowing endangerment" criminal provisions of RCRA, statute not unconstitutionally vague, instructions as to a general intent were sufficient).

This approach to intent for environmental crimes under RCRA or as to

similar statutes differs from the other oft-cited case of United States v. Johnson & Towers Inc., 741 F.2d 662 (3rd Cir. 1984), cert den. 469 U.S. 1208, involving criminal RCRA transportation and storage violations. On the intent issue, the Johnson & Towers court stated [emphasis supplied]:

> [I]n light of our interpretation of section 6928(d)(2)(A), it is evident that the district court will be required to instruct the jury...that in order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit. Depending on the evidence...such knowledge may be inferred.

The court noted language in International Minerals that under certain regulatory statutes requiring "knowing" conduct "the government need prove only knowledge of the actions

taken and not of the statute forbidding them." Nevertheless, Johnson & Towers determined that each element of a RCRA criminal offense must be shown to have been "knowingly" committed.

Further, in United States v. Thompson-Hayward Chemical Co., 446 F.2d 583 (8th Cir. 1971), the court reviewed a criminal case similar to International Chemicals as to "knowing" misidentification of chemicals being transported (18 U.S.C. Sec. 834). Jury instructions indicated a "sudden instance of forgetfulness" is no defense and that "neglect, carelessness or inattention" could satisfy the knowledge requirement.

The Thompson-Hayward court reversed, noting willfulness or deliberate action is necessary. The

jury instruction:

> read as a whole, could easily give the jury the impression that no proof of intent or willful neglect was necessary and that it was a situation in which the statute imposed strict liability.

The court noted that strict liability was not intended by the statute and some overt proof of knowledge was necessary. The Government "had to prove beyond a reasonable doubt that defendant's actions were deliberate or the result of willful neglect." [emphasis retained] The instruction did not accomplish this purpose and the conviction was reversed.

In United States v. United States Pipe and Foundry Company, 415 F.Supp. 104 (D. Tenn. 1976), the court stated that knowledge a shipment was of dangerous materials "is essential to a conviction" under the statute, and found

the defendant did not act "willfully and knowingly" in failing to properly mark the vehicle transporting the substances. It thus rendered a not guilty verdict on that count.

In the present case, there was discussion by the Government at trial, particularly in closing argument, of "willful blindness" as tantamount to intent. In United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) cert.den. 96 S.Ct. 3173, the court considered the "willful blindness" issue and stated "willful blindness" is present when a defendant who is "aware of the probable existence of a material fact" does not "satisfy himself that it does not in fact exist."

A "conscious purpose to avoid learning the truth" or "deliberate

ignorance" could be within the "knowing" definition, but such deliberate ignorance must be part of a "calculated effort" to avoid sanctions of a statute while violating its substance.

See also Annotation, 8 ALR Fed 816, "Criminal Liability for Transportation of Explosives and Other Dangerous Articles Under 18 U.S.C. 831-835 and Implementing Regulations" esp. Section 5 (knowledge requirement). And see 21 AmJur2d Criminal Law (Rev.), Secs. 137 and 141. For other discussions of intent issues in environmental statutes, see, e.g., C. Harris, P. Cavanaugh, and R. Zisk, Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives, 23 Wake Forest L.Rev. 203 (1988); A. Fike, A Mens Rea Analysis for

the Criminal Provisions of the Resource Conservation and Recovery Act, 6 Stanford Env.L.J. 174 (1986), and D. Riesel, Criminal Prosecution and Defense of Environmental Wrongs, 15 ELR 10065 (March, 1985).

Thus, knowledge cannot be mere accident or mistake, but must be clearly shown by the evidence. Even "willful blindness" requires "deliberate ignorance" or a "conscious attempt" to avoid the truth.

Yet these descriptions of criminal intent, either the broad view of Hayes International or the more restrictive view in Johnson & Towers, and even the "presumption" that one dealing with hazardous waste must be aware there are regulations concerning that waste (International Minerals), do not, con-

trary to the Fourth Circuit's conclusion, amount to criminal intent here. Petitioners indeed were well aware of the APG regulations dealing with hazardous wastes. But those supposedly comprehensive regulations did not note criminal responsibility for violations. Petitioners were never informed by any superior or base commander in the three years covered by the indictment that such liability could be imposed.

There was ample evidence that Petitioners repeatedly attempted, without success, to arrange for repair and improvements to the Pilot Plant. These repairs were never performed. The Pilot Plant simply was closed.

There was no evidence of any personal gain by Petitioners. This factor significantly speaks to their

lack of criminal intent. Further, chemical storage problems at the Old Pilot Plant problems, began when it was closed in 1978, years before Petitioners came on the scene and four years before the earliest date of the indictment. One cannot "inherit" an environmental crime, another basic issue rejected by the Fourth Circuit without consideration of the background here (see 912 F.2d at 748-49).

Petitioners also did not consciously attempt to evade the truth. They sought to direct attention to and obtain relief from deteriorating Pilot Plant conditions. They did not seek to avoid environmental requirements. Even a general criminal intent to violate environmental law was never shown here.

CONCLUSION

Crucial issues are presented here for review by this Court of immunity and of criminal intent, regarding a major federal environmental law. While this is a unique situation-- federal prosecution against federal employees for alleged violations of environmental laws--it is a scenario likely to be repeated in future federal enforcement of hazardous waste laws at federal facilities. This Court therefore can offer crucial guidance in this area. Petitioners submit these circumstances present a proper case for a Writ of Certiorari, which action they respectfully request.

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